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QUESTIONS PRESENTED FOR REVIEW

Whether this Court has certiorari jurisdiction under 28 U.S.C. §1257(3) (1982) where:

A. The judgment below denying homestead tax exemption to Cuban/ Haitian Entrants (status pending) is based on the separate, adequate and independent state ground of failure to meet the state constitutional and statutory requirement of intent to establish permanent residence in Florida; and

B. No conflict on a question of federal law exists between the decision sought to be reviewed and decisions of this Court.

STATEMENT OF THE CASE

Respondent Randy Miller, Executive Director of the Department of Revenue, State of Florida, adopts and incorporates by reference the Statement of the Case outlined in the Brief of Respondents Merritt Stierheim, County Manager for Dade County, Florida, and Franklin B. Bystrom, Property Appraiser for Dade County, Florida. Respondent Miller notes, however, that many facts presented by Petitioners are not part of the record below. Indeed, since the decision of the trial court was to grant defendants' motion to dismiss, no evidentiary hearing ever took place.

SUMMARY OF ARGUMENT

1. Petitioners fail to establish that the state court decided a federal question in a way in conflict with an applicable decision of this Court.

Therefore, the Petition for Writ of Certiorari should be denied. 28 U.S.C. §1257(3); Supreme Court Rule 17.1(c).

2. The state appellate court decision indicates clearly and expressly that it is based on a bona fide separate, adequate and independent state ground. Accordingly, the Petition for Writ of Certiorari should be denied.

ARGUMENT

Respondent Miller concurs with the Brief in Opposition filed by Respondents Stierheim and Bystrom and the following is submitted to supplement that Brief.

I.

Petitioners seek to invoke the discretionary jurisdiction of this Court pursuant to 28 U.S.C. §1257(3), by contending that the Third District Court

of Appeal decided federal questions in a way which "directly conflicts with this Court's holdings in Elkins v. Moreno, 435 U.S. 647 (1978), Vlandis v. Kline, 412 U.S. 441 (1973), Toll v. Moreno, 458 U.S. 1 (1982)." (Petition for Writ of Certiorari at 10). The conflicts presented by Petitioners are contrived. The state court has not decided a federal question in a way in direct conflict with any applicable decisions of this Court.

The opinion of the appellate court below does not conflict with the case of Toll v. Moreno, 458 U.S. 1 (1982). In Toll, this Court held that the University of Maryland's policy regarding instate tuition, as applied to G-4 aliens and their dependents, violates the supremacy clause of the United

States Constitution. There are many factors involved in the reasoning in Toll that make it distinguishable from the instant case. This Court in Toll cited several cases at length which "have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders." 458 U.S. at 10. The cases discussed, however, had to do with classifications directly based upon alienage. Specifically, the Toll court referred to Takahashi v. Fish & Game Commission, 334 US 410, 418-420, (1948). In Takahaski, a California statute that precluded aliens who were "ineligible for citizenship under federal law" from obtaining commercial fishing licenses. In Graham v. Richardson, 403 U.S. 365

(1971) this Court held that a state may not withhold welfare benefits from resident aliens merely because of their alienage. Further, this Court noted that the specific aliens concerned in the Toll case, G-4 aliens,[1] are relieved of federal, and in many instances, state and local taxes, on the salaries paid by certain international organizations. The special privileges granted to G-4 aliens indicate that the legal status of G-4 aliens is distinguishable from the Petitioners herein.

The Florida Statute specifying eligibility requirements for receiving

[1] G-4 visas are issued to non-immigrant aliens for officers or employees of certain international organizations and to members of their immediate families.

$25,000 exemption from ad valorem taxes on homesteads (§§196.031 and 196.012, Florida Statutes) are not based upon alienage. Homestead exemption is denied to anyone who is not a permanent resident of Florida. Aliens are not singled out or referred to in any way in the Florida Constitution or Florida Statute. This is consistent with the holding in Toll v. Moreno in which this Court stated:

> It is important to note that this case does not involve, and we express no views regarding, a State's imposition of a burden on all individuals sharing a common relevant characteristic, of whom only some are aliens.

Toll, 458 U.S. at 17 n. 25.

Nor does the opinion of the state appellate court below conflict with the case of Elkins v. Moreno, 435 U.S. 647

(1978) for the reasons set forth in the brief submitted by Respondents Stierheim and Bystrom (pages 7-12). Elkins also concerned the denial of instate status to G-4 aliens in order to receive instate tuition rates. Thus, even though federal statutes were involved, this Court turned to the state for the resolution of the question of whether or not G-4 aliens could become domiciliaries of Maryland:

> Accordingly, the question whether G-4 aliens have the capacity to acquire Maryland domicile is potentially dispositive of this case. Since the resolution of this question turns on federal statutory law and Maryland common law as to each of which there are no controlling precedents, we set out the correct meaning of federal law in this area and then sua sponte certify this case to the Court of Appeals of Maryland in order to clarify

> state-law aspects of the domicile question.

Elkins, 435 U.S. at 662.

The opinion of the state appellate court below does not conflict with the case of Vlandis v. Kline, 412 U.S. 441 (1973) as modified by Weinberger v. Salfi, 422 U.S. 749 (1975). In Vlandis, this Court held unconstitutional a Connecticut statute which, for the purposes of receiving in-state tuition rates, classified as non-residents an unmarried student whose legal address was outside of Connecticut for any part of the one-year period immediately preceding his application for admission, and a married student whose legal address was outside of Connecticut at the time of his application for admission. This Court held that Connecticut was forbidden by the

Due Process Clause to deny an individual the resident rates on the basis of:

> A permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination. (e.s.)

Vlandis v. Kline, 412 U.S. at 452.

The opinion in Vlandis was modified by Weinberger v. Salfi, 422 U.S. 749, which concerned an attack on a nine month duration-of-relationship requirement of the Social Security Administration to receive benefits. The suit was brought by a widow who had been married to her deceased husband less than 6 months at the time of his death. This Court found Vlandis and other cases[2] to be not controlling adopting

[2]Stanley v. Illinois, 405 U.S. 645, which held invalid a state's denial of a hearing on parental fitness to an unwed father when such a hearing was granted to all other parents whose custody of

(CONTINUED ON NEXT PAGE)

instead more of an equal protection analysis regarding classifications in the area of social welfare. After discussing the relationship between equal protection analysis and due process analysis, the Salfi Court applied a rational relationship test to determine the validity of the conclusive legislative presumption and found that Constitutional standards were met.

In Salfi, this Court quoted from several cases distinguishing between standards used to analyze classifications made in the area of economics and social welfare as opposed to those involving "the most basic economic needs of impoverished

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[2]CONTINUED
their children was challenged, and Cleveland Board of Education v. La Fleur, 414 U.S. 632, which held invalid school board regulations requiring school teachers to take unpaid maternity leave commencing four to five months before the expected birth.

human beings." Salfi, 422 U.S. at 769.

Quoting from Dandridge v. Williams, 397 U.S. 471. (1970) this Court said:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v. Natural Carbonic Gas Co. 220 US 61, 78, 55 L.Ed. 369, 31 S.Ct. 337. 'The problems of government are practical ones and may justify, if they do not require, rough accomodations-illogical, it may be, and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 US 61, 69-70, 57 L.Ed. 730, 22 S.Ct. 441. . . .

Weinberger v. Salfi, 422 U.S. at 769.

Although the case sub judice does not deal with the areas of economics or social welfare, the rationale is important because this Court has reached similar conclusions in analyzing state taxing statutes:

> In taxation, even more than in other fields, legislatures possess the greatest freedom in classification.

Madden v. Kentucky, 309 U.S. 83, 88, (1940). In Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959), this Court upheld an Ohio tax scheme which assessed taxes for ad valorem tax purposes on merchandise held in warehouses for storage only by residents while exempting the same merchandise of nonresidents. In reviewing the tax scheme there, this Court said:

> The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. (emphasis added)

358 U.S. at 526.

Similarly, Florida's denial of $25,000 exemption from ad valorem taxation of homesteads to all who are not permanent residents of the State easily meets these constitutional standards.

Florida's denial of homestead exemption to Cuban/Haitian Entrants

(status pending) does not conflict with Vlandis as modified by Salfi for several reasons:

Florida requires a person to be a permanent resident in order to qualify for homestead exemption. It does not distinguish between old and new residents. Rather, it requires them to be legally permanent residents of the state. Further, Florida's presumption is not permanent since federal law may eventually confer permanent resident status to Cuban/Haitian Entrants (status pending). No evidence has been presented here by Petitioners to show that legally, Cuban/Haitian Entrants (status pending) have been granted permanent resident status by federal or state law. A fortiori, it is universally true that Cuban/Haitian Entrants (status pending) have not been granted permanent resident status. Under Salfi, the proper stan-

dard of review is the rational basis test since Florida's requirement for permanent residence does not discriminate on the basis of alienage but is imposed on all non-permanent residents; and an exemption from taxation does not involve a basic necessity of life or basic economic need. Under Florida case law, an exemption from taxation is a special favor or privilege granted by the Legislature which is to be strictly construed against the taxpayer. State v. Thompson, 101 So.2d 381 (Fla. 1958); State ex rel. Szabo Food Service, Inc. v. Dickinson, 286 So.2d 529 (Fla. 1973). As noted above, this Court gives wide latitude and defers to states in tax matters.

No conflict exists between the state court's opinion below and the decisions of this Court.

II

This Court should deny the Petition for Writ of Certiorari because the state court decision indicates clearly and expressly that it is based on a bona fide separate, adequate and independent state ground. Michigan v. David Kerk Long, 463 U.S. 1032 (1983).

The opinion of the Florida appellate court sought to be reviewed, Liphete v. Stierheim, 455 So.2d 1348 (Fla. 3d DCA 1984), states in its entirety: "Per curiam. Affirmed. Alcime v. Bystrom, 451 So.2d 1037 (Fla. 3d DCA 1984)." An examination of Alcime and cases upon which it relies is necessary to show that the decision below is based on a bona fide separate, adequate and independent state ground.

The Florida appellate court in Alcime held that the appellant, an alien

without a permanent visa, could not, under the prevailing interpretation of the applicable Florida Statute, prove an intention to become a permanent resident for homestead tax exemption purposes. The Florida Statute referred to in Alcime is §196.012(16), (17), F.S., 1981.[3] which defines "permanent resident" and "permanent residence." For the prevailing interpretation referred to in Alcime, the appellate court cited as authority Juarrero v. McNayr, 157 So.2d 79 (Fla. 1963); cf. Matter of Cooke, 412 So.2d 340 (Fla. 1982).

Petitioners argue that both Juarrero and Cooke interpreted federal immigration law in a manner "arguably

[3]Brief of Petitioners page 4 contains the 1983 version of this statute which is unchanged from the 1981 version cited by the appellate court.

contrary" to this Court's decisions. An examination of these cases reveals the contrary.

In Juarrero the Florida Supreme Court interpreted the State constitutional provision providing for homestead exemption from ad valorem taxation and the Florida Statutes which defined "resident". The Florida Supreme Court held that appellants, Cuban political refugees holding temporary visas, cannot legally intend to "do that which by law and the temporary nature of their visas they are prohibited from doing." Juarrero, 157 So.2d at 81. The only reference to federal concepts in the opinion are 1) a reference to the nature of the visas being temporary rather than permanent and 2) rejecting appellants' argument that the 14th Amendment to the Constitution of the United States had been violated:

> We have not overlooked appellants' contention that the denial of homestead exemption to these alien refugees would deprive them of their property rights under the Constitution of the State of Florida and of their rights under the Equal Protection clause of the 14th Amendment to the Constitution of the United States. One cannot complain that he has been denied due process or equal protection if every other person within a reasonable classification to which he belongs is treated in the same manner.

Juarrero, 157 So.2d at 81.

Finally, Matter of Cooke, 412 So.2d 340 (1982) was heard by the Florida Supreme Court on the certified question of law from the United States Court of Appeals, Fifth Circuit of whether Florida allows foreigners visiting the United States to place a residence owned in the state beyond the reach of creditors under the Florida homestead

exemption.[4] The Fifth Circuit decided that the question involving the disallowance of homestead exemption claimed by a debtor-tourist in bankruptcy proceedings was one of Florida law appropriate "for resolution by the highest court of Florida." Cooke, 643 F.2d at 277.

The only reference to federal law in the state court Cooke opinion was the Court's quotation from the federal bankruptcy judge who explained Cooke's status under federal law. Agreeing with the analysis of the federal bankruptcy judge, the Florida Supreme Court in Cooke adopted the rationale of Juarrero

[4]This homestead exemption is not the exemption sought by Petitioners, sub judice, but rather the exemption from forced sale of a homestead owned by the head of a family, Article X, Section 4, Constitution of Florida (1968).

and held that Cooke could not legally formulate the requisite intent to make Florida his permanent home. The Fifth Circuit, recognizing the question to be primarily one of state concern, relied on the Florida Supreme Court's answer and held that "a tourist cannot legally formulate the intent to make his residence his family's permanent place of residence." Matter of Cooke, 683 F.2d 130 at 131 (1982).

Thus, it is evident that the Florida appellate court below in issuing a per curiam affirmance without opinion citing its earlier opinion in Alcime v. Bystrom (which in turn cited two Florida Supreme Court cases) relied on interpretation of the State Constitution and statutes, not federal law as argued by Petitioners.

Beyond the Florida court decisions, an examination of the authorities relied

upon by Petitioners must be examined. Petitioners argue that the denial of homestead exemption from ad valorem taxation on the basis of Petitioners' lacking the legal capacity to form the requisite intent to reside permanently is a violation of federal law. Specifically, Petitioners state (Petition for Writ of Certiorari at 15):

> [The Cuban/Haitiant entrant program] was created by Presidential directive in response to a critical political situation. While no act or regulation defines it, the Executive policies expressed and the status created have the full force and effect of law. U.S. v. New Orleans Public Service, Inc., 553 F.2d 459 (5th Cir., 1977).

This argument is without merit.

The holding in U.S. v. New Orleans, affords Petitioners little help. The

"Executive policies" and documents supplied in Petitioners' Appendix do not fall within the parameters of U.S. v. New Orleans:

> As we indicated earlier in this opinion, the Executive Order and its implementing regulations have the force and effect of law, were implemented pursuant to statutory procurement authority and have been approved by Congress since being issued. (emphasis added)

553 F.2d at 471.

Petitioners refer to a "Presidential Order" but do not supply a citation to an Executive Order.[5] An examination of the documents attached to Petitioners' Appendix and their reference thereto reveals that there is

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[5]Petitioners, Appellants below, did refer to Executive Order 12208 on pages 8 and 9 their reply brief submitted in the state appellate court. However, (CONTINUED ON NEXT PAGE)

no federal authority granting Cuban/Haitian entrants the status of permanent residence.

Petitioners refer to a statement by Victor H. Palmieri, U.S. Coordinator for Refugee Affairs, at a State Department Press Briefing on June 20, 1980 (PA-A40). Mr. Palmieri's statement specifically states that the President has decided to seek special legislation regularizing the status of Cuban/Haitian entrants which will allow them to remain in the U.S. and make them eligible for certain benefits. The statement continues to refer to Cuban/Haitian

[5]CONT. a review of Executive Order 12208 and the federal statutes cited therein reveals that said Order does not grant permanent residency to Cuban/Haitian Entrants. On the contrary, it refers to the authority delegated to the Attorney General, the Secretary of State, and the U.S. Coordinator for Refugee Affairs regarding emergency conditions for admission to the United States, reports to Congress, and other items.

entrants who will have their parole reviewed for a six month period as "Cuban/Haitian entrants (status pending)". This statement continues that special legislation will be submitted to Congress to provide for, among other things, conversion to permanent resident alien status after two years. Petitioners cite to no congressional legislation enacted subsequent to Mr. Palmieri's statement which has granted the status of permanent resident to Cuban/Haitian entrants.

Next, Petitioners attach two documents relating to the Social Security Administration: a Program Instruction Action Transmittal (PA-A35) and a Telegraphic Message (PA-A38). These documents refer to eligibility of

Cuban/Haitian entrants (status pending) for certain benefits of the Social Security Act including, among others, aid to families with dependent children, and aid to the blind. Petitioners argue that the language in this telegraphic message (PA-A39) which states that "the stamped I-94 constitutes evidence of permanent residence in the U.S. under color of law" is evidence that the aliens have permanent status. However, the reading of the remainder of the paragraph reveals that the reference to permanent residence relates solely to eligibility for certain types of federal aid. The I-94 card is a record of arrival and departure issued when entering the United States. It contains an expiration date and is surrendered upon departure. However, the reference to the required stamp on the I-94 card reads as follows:

"Cubans/Haitians Entrant (Status Pending) reviewable January 15, 1981. Employment authorized until January 15, 1981."

Thus, the stamp referred to in the documents submitted by Petitioners expressly states that th status is still pending and will be reviewed upon a date certain. The I-94 card itself and the stamp referred to above do not grant "permanent residence". Cuban/Haitian Entrants (Status Pending) are not legally permanent residents under the immigration law but are simply allowed to reside in the United States on an indefinite basis until their permanent status is decided. If these persons are not permanent residents under federal standards, it follows that Florida's denial of homestead exemption because Petitioners are not permanent residents is proper.

Accordingly, the denial of home-

stead exemption from ad valorem taxation by the Dade County Property Appraiser does not infringe upon any federal law nor reject any federally established status. Rather the decision and the state case law it relies upon are based solely and totally upon state law and an analysis of Florida's Constitution.

The Petition for Writ of Certiorari should be denied because the state court decision is based upon a bona fide separate, adequate and independent state ground. It does not rest primarily on federal law, nor is it interwoven with federal law. The adequacy and independence of the state law ground is clear from the face of the opinion. Michigan v. David Kerk Long, 463 U.S. 1032 (1983).

Finally Petitioners' claim that the granting of this writ is of vital importance to tens of thousands of

aliens residing in South Florida is unfounded. On the contrary, the issue in this case would impact only those Cuban/Haitian entrants who own homes, who have properly applied for and have been denied homestead exemption because they are not permanent residents but who otherwise would qualify for the exemption. To date, this Respondent is aware of only two such cases, the Petitioners and the Alcimes.

CONCLUSION

For the reasons stated above the petition for writ of certiorari should be denied.

Respectfully submitted,

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